

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GERALD V. PETERSEN**  
Claimant

VS.

**BUILDERS CONCRETE & SUPPLY, INC.**  
Respondent

AND

**EMPLOYERS MUTUAL CASUALTY CO.**  
Insurance Carrier

Docket No. 1,016,827

**ORDER**

Claimant requested review of the October 24, 2005 Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on February 1, 2006.

**APPEARANCES**

Andrew L. Oswald of Hutchinson, Kansas, appeared for the claimant. Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed claimant's average gross weekly wage was \$645.02 for both alleged accident dates.

**ISSUES**

The claimant alleged he suffered injuries to his cervical spine as a result of a fall at work on July 14, 2003. Claimant alleged further injury and aggravation to his cervical spine due to repetitive trauma each and every day worked through November 17, 2003.

The Administrative Law Judge (ALJ) found the claimant did not provide the respondent with timely written claim for the July 14, 2003 accidental injury. The ALJ further determined claimant did not suffer a series of repetitive injuries after the July 14, 2003

accident and, in any event, failed to provide respondent timely notice of that alleged series of injuries. Consequently, the ALJ denied claimant's request for workers compensation benefits.

The claimant requests review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) date of accident; (3) notice; (4) written claim; (5) underpayment/unpaid temporary total disability due; (6) medical reimbursement; and, (7) nature and extent of disability. Claimant argues he sustained a compensable work-related injury in a fall at work and then aggravated that condition in a series of repetitive injuries as he continued working. Claimant further argues that timely notice and written claim was provided to the respondent.

Respondent raises the issues of timely written claim and notice. Respondent argues the claimant did not file a timely written claim for the July 14, 2003 accident nor timely notice for the alleged series of repetitive injuries ending November 17, 2003. Consequently, respondent requests the Board to affirm the ALJ's Award. In the alternative, if the claim is determined to be compensable, the respondent argues the claimant has not put forth a good faith effort to find full-time employment. And any award of permanent partial disability compensation should be reduced by claimant's social security retirement benefits.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant, a construction worker, fell on July 14, 2003, while working for the respondent. He was taken to the emergency room where x-rays of his head and cervical spine were performed as well as a CT scan of his head. He was released and told to follow up with his personal physician. Claimant followed up with Dr. Joseph Luinstra and was released from treatment for the injury on July 24, 2003. The claimant, by his own admission, no longer considered himself to be receiving treatment for his work-related accident because Dr. Luinstra had told him his problems were not work-related and claimant began turning in his medical bills to his personal health insurance company. Nor did claimant request respondent provide additional treatment as a result of the fall at work.

It is undisputed claimant provided written claim for compensation on May 4, 2004, when he delivered a "Notice of Accident and Claim for Workers' Compensation" form to respondent.<sup>1</sup> This document indicated claimant was injured on July 14, 2003 and each and every day through November 17, 2003.

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<sup>1</sup> R.H. Trans., Clmt's Ex. 1.

K.S.A. 44-520a(a) states in part:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; . . . .

As the May 4, 2004 written claim is beyond 200 days from July 14, 2003 as well as from July 24, 2003, when claimant was released from treatment by Dr. Luinstra, this document fails to meet claimant's burden of proof that he filed timely written claimant for the July 14, 2003 fall at work.

Claimant argues he was never disabused of his right to continued medical treatment after initially receiving treatment from Dr. Luinstra. *Blake*<sup>2</sup> and *Shields*<sup>3</sup> hold that the employer has an affirmative duty to notify a worker, once medical treatment is no longer deemed authorized, before the written claim time will begin to run. In *Blake*, the respondent and insurance carrier authorized a treating physician to provide care to the injured claimant. When the authorized treating physician referred claimant to other doctors for additional care and treatment, these referrals were also authorized. In *Blake*, care and treatment by one of these referred physicians was provided to the claimant within 200 days of the filing of timely written claim. The insurance carrier refused to pay for these later referrals. The court held that where an employer and insurance carrier had once authorized a course of treatment for a worker they cannot effect a "suspension" of such compensation, and start the worker's claim time running, merely by failing to pay medical bills as they are received. At least where the respondent is on notice that the worker is seeking additional treatment on the assumption that he is still covered they are under a positive duty to disabuse him of that assumption if they intend to rely on the 200-day statute.

*Blake* and *Shields* can be easily distinguished from this case. First, claimant was under Dr. Luinstra's treatment until July 24, 2003, at which time claimant was returned to work without restrictions and with no indication of any ongoing treatment. Additionally, claimant testified that Dr. Luinstra told him that his problems were not work-related. Claimant never requested respondent provide additional medical treatment for the fall. Claimant was notified and, by his own testimony, aware that medical treatment for his July 14, 2003 accidental injury had ceased.

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<sup>2</sup> *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

<sup>3</sup> *Shields v. J. E. Dunn Constr. Co.*, 24 Kan. App. 2d 382, 946 P.2d 94 (1997).

Claimant next alleges that he provided respondent additional documents which satisfied the written claim requirements for the July 14, 2003 accident. The documents are from the Wichita Clinic and signed by Dr. Luinstra.<sup>4</sup> The forms are identified as "Work Comp Patient Progress Form" but are filled out to indicate claimant was released to return to work. As previously noted, Dr. Luinstra, by claimant's testimony, had released claimant from any further treatment for the fall when he was released to return to work on July 24, 2003.

The Supreme Court has stated that the purpose of written claim is to enable the employer to know about the injury in time to investigate it.<sup>5</sup> The same purpose or function has been ascribed to the requirement for notice found in K.S.A. 44-520.<sup>6</sup> Written claim is, however, one step beyond notice in that an intent to ask the employer to pay compensation is required. In *Fitzwater*<sup>7</sup>, the Kansas Supreme Court described the test as follows:

In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. **The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?** (Emphasis added)

Dr. Luinstra's progress notes were provided to the respondent and simply indicate claimant was released to return to work. Had they indicated claimant was taken off work then it could be argued claimant was requesting compensation but, in this instance, the forms simply indicated claimant could return to work. Claimant was not asking for compensation nor additional treatment but was simply assuring respondent that he was physically able to return to work. Under these circumstances, the Board cannot find written claim was satisfied by those documents.

Most significantly, claimant testified that he first intended to ask for compensation when he delivered the written notice on May 4, 2004. Claimant testified:

Q. At some point after the - - you obtained surgery did you decide to file a workers' compensation claim?

A. Well, yes, it was after I had surgery.

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<sup>4</sup> Allen Depo. (Jan. 19, 2005), Ex. 1.

<sup>5</sup> *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (1973).

<sup>6</sup> *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

<sup>7</sup> *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

Q. What made you decide to file a workers' compensation claim?

A. Because I realized and the doctors explained it to me that the fall did the damage to the ligaments, the ligaments related to the neck, and the neck was - - vertebrae were sliding in on it. It was caused from the fall.

Q. Did you at some later date after the surgery file a written claim for benefits?

A. Yes, I did.<sup>8</sup>

After surgery, claimant delivered his written claim to respondent on May 4, 2004. Claimant has failed to meet his burden of proof that he filed a timely written claim for the July 14, 2003 fall at work.

Claimant next argues that after the fall at work he suffered repetitive trauma injuries to his cervical spine as he continued working through November 17, 2003. Consequently, the last day worked before surgery would be his date of accident and written claim on May 4, 2004 would be timely.

The ALJ determined claimant failed to meet his burden of proof that he suffered a series of repetitive injuries after the fall at work on July 14, 2003. The ALJ stated:

Claimant never testified to any additional trauma, only that looking up caused him to be symptomatic. Dr. Mills' testimony establishes that no additional injury occurred as a result of looking up. On the contrary, Claimant was merely experiencing symptoms of the progression of his precipitating injury of July 14. Claimant never gave any testifying physician any history of any additional injuries after July 14, or of a progression of symptoms associated with work duties. On the contrary, Claimant told Dr. Brown that his work was largely limited to monitoring a computer and pushing buttons after July 14. Dr. Brown is the only physician to testify that he actually discussed with Claimant his post-July 14 work activities. Dr. Brown concluded that while those work activities could have aggravated Claimant's condition, he did not believe they actually did so. Dr. Murati is the only physician to testify that Claimant suffered a series of accidents each working day after July 14, 2003. In doing so, however, he acknowledged that he was simply adopting the date of accident advanced by Claimant's counsel. Dr. Murati's history contains no reference to a series of accidents, and he looked at Hardin's description of job activities to support his conclusion. Dr. Murati, having not discussed with Claimant the actual job duties performed after July 14, 2003, is interpreted by the Court as opining that Claimant *could have* suffered additional injury after July 14, 2003. When viewing the record as a whole, **the evidence presented falls far short of establishing any such series of accidents after July 14, 2003.**<sup>9</sup>

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<sup>8</sup> R.H. Trans. at 40.

<sup>9</sup> ALJ Award (Oct. 24, 2005) at 10.

The ALJ further determined claimant failed to provide respondent timely notice of the alleged series of accidents. The ALJ found:

Claimant did not report any additional injury to Respondent attributable to a claimed series of accidents. While Claimant discussed his on-going complaints around the table in the break room, he did so in the context of complaining about Dr. Luinstra's failure to identify and remedy **what Dr. Luinstra determined was a personal condition of Claimant's**. Claimant never told Respondent that his on-going work activities were aggravating his condition, although he may have told Respondent's representatives that he believed his neck complaints were attributable to his July 14 fall. Claimant did not specifically allege that his neck complaints or upper extremity complaints were work-related, either as a result of the initial fall of July 14, 2003 or subsequent work activities, until he submitted his written claim for compensation on May 4, 2004. That date is more than 75 days after Claimant last worked for Respondent. **Claimant failed to give timely notice of a claimed series of accidents ending on or about November 17, 2003.**<sup>10</sup>

The Board agrees and affirms.

In summary, the claimant was injured in a fall at work on July 14, 2003. He was provided emergency room treatment and follow up care with his personal physician. He was then released from treatment for that injury by his physician. Respondent, as well as its insurance carrier were provided notice of the July 14, 2003 accident and paid for the emergency room treatment as well as the treatment provided by Dr. Luinstra. But claimant, by his own testimony, intended to claim compensation benefits with his written claim delivered to respondent on May 4, 2004.

The workers compensation act has three separate statutes of limitations, any one of which will defeat an otherwise valid claim for a work-related injury. It is difficult to consider denial of a compensable work-related injury that the employer and its insurance carrier knew about and furnished medical treatment for, that had timely notice and timely application for hearing, but not timely written claim as establishing good public policy. But that is what the law requires and the ALJ's denial of this claim is affirmed.

The Board is mindful that respondent's insurance carrier's adjuster wrote claimant a letter which indicated that she had been assigned his "claim for Workers' Compensation benefits" for the July 14, 2003 date of accident.<sup>11</sup> But claimant neither responded to the letter nor contacted the adjuster. Again, this demonstrates respondent and its insurance carrier were aware of the accident and, as previously mentioned the insurance carrier paid for the treatment claimant initially received at the emergency room and with Dr. Luinstra.

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<sup>10</sup> *Id.* at 12.

<sup>11</sup> Smith Depo., Ex. 3.

It appears the purpose and intent of the written claim requirement was satisfied but not the literal requirement of a writing submitted with the intent of obtaining workers compensation benefits. And as previously noted, claimant stated that the first time he intended to claim benefits was when he delivered the May 4, 2004 written claim to respondent.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 24, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Andrew L. Oswald, Attorney for Claimant  
       Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
       Bruce E. Moore, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director